COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts	DTE 01-31

APPEAL OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FROM HEARING OFFICER'S RULING ON MOTION FOR PROTECTIVE TREATMENT

Pursuant to 220 CMR 1.06(6)(d)(2), AT&T Communications of New England, Inc. ("AT&T") files this appeal of the Hearing Officer's ruling of September 7, 2001, on AT&T's Motion for Protective Treatment (*"AT&T's Motion"*). The Hearing Officer exceeded her discretion by failing to strike a proper balance between the protection of proprietary materials and the public's interest in having documents placed on the public record. If her decision is allowed to stand, it could have a negative impact on the ability of AT&T and other CLECs to participate and provide their perspective in Department proceedings such as the present one.

Background

On August 24, 2001, AT&T filed the testimony of John Mayo, Anthony Fea and Deborah S. Waldbaum. Because the testimony of Mr. Fea ("Fea Testimony") contained highly proprietary and sensitive information and trade secrets, AT&T also filed a Motion for Protective Treatment of Confidential Information. No party filed an objection to AT&T's Motion.

On September 7, 2001, the Hearing Officer issued the Hearing Officer Ruling On Motion Of AT&T Communications Of New England, Inc. For Protective Treatment Of Confidential

Information ("Hearing Officer Ruling")(attached as Exhibit A). In this ruling, the Hearing Officer held that AT&T had not provided proper support for its motion and denied AT&T's request that the confidential portions of the Fea Testimony not be placed on the public record. Because the Hearing Officer erred and because the Fea Testimony should be accorded protective treatment, AT&T now brings this appeal of the Hearing Officer Ruling.

Argument

I. The Hearing Officer Erred When She Ruled Against AT&T.

The Department's regulations allow the Hearing Officer discretion to conduct hearings and to make decisions with regard to procedural matters. 220 C.M.R. § 1.06(6)(a). However, that discretion is not unlimited and where, as in this case, the Hearing Officer has exceeded her discretion, the Department will overturn a Hearing Officer's ruling on procedural matters. This is such an instance. The Hearing Officer's denial of AT&T's Motion for Confidential Treatment should be overturned because she has made a ruling that is inconsistent with the applicable legal standard in this situation and that will have a negative impact on the voluntary participation of CLECs in proceedings such as the present one.

In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

The information contained in the Fea Testimony is competitively sensitive, proprietary, and confidential. The testimony provides the percentage of customer buildings that AT&T serves using its own facilities, referred to as "Type I" provisioning. The testimony also provides the percentage of customer buildings that AT&T serves using equipment and facilities leased from other carriers, otherwise known as "Type II" provisioning. In *AT&T's Motion*, AT&T

pointed out that a carrier's level of service depends (at least in part) upon the extent to which it relies on its own facilities versus those of others and that a competing carrier's knowledge of such information could therefore be used in marketing to gain a competitive advantage. *See, id*. at 2.

The Hearing Officer nevertheless denied AT&T's Motion. The Hearing Officer's ruling did not specifically find that the percentage of leased facilities a carrier uses to provide service to its customers is not proprietary *per se*. Rather, the Hearing Officer's ruling found that AT&T had failed to meet its burden that such a percentage is proprietary because AT&T had disclosed that the minimum percentage it could be is 50%. *See Hearing Officer Ruling* at 4-5. The heightened burden required by the Hearing Officer goes beyond showings that have been required in the past, especially where (a) the information belongs to an intervenor whose prices and regulation are not the subject of this proceeding, and (b) the information will be provided pursuant to appropriate protection to the Department and to all parties for full and complete use in the proceeding.

Contrary to the Hearing Officer's ruling, there is a significant difference between knowing the *minimum* percentage of leased facilities a number *could* be and knowing the specific number that comes close to the actual percentage. There is no competitive consequence to revealing that AT&T's figure is something more than 50% because it is generally known that almost all of AT&T's competitors will provide at least 50% of their services over leased facilities. However, it would provide a distinct, and unfair, advantage to AT&T's competitors if they knew whether AT&T is relying on leased facilities for provisioning 51% of its services or whether AT&T is relying on leased facilities for providing 99% of its services.

One factor affecting the quality of service that a CLEC can provide is the extent to which it must lease facilities from the ILEC. A carrier that knows the exact percentage of customers that a competing carrier provisions by leasing facilities can capitalize on that information for marketing purposes (*i.e.*, state that they provision 5% or 10% fewer customers using leased facilities) and therefore gain an unfair competitive advantage. Customers do differentiate carriers on the basis of provisioning via the carrier's own network as opposed to provisioning via leased equipment and facilities. *See* Affidavit of Joseph Stack filed concurrently with this appeal.[2]

Furthermore, the information for which protection is sought was developed by AT&T at AT&T's expense for its own internal purposes and AT&T's own handling of this information demonstrates its sensitive nature. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information.

In short, the information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. Competitive disadvantage to AT&T is likely to occur if the confidential information is made public. No harm will result if the information is protected because it will still be available for use in this docket. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would

[2] Although this information was not explicitly explained in AT&T's original motion, the Department recently considered similar information mentioned for the first time in Verizon's appeal of the July 19, 2001, Hearing Officer's Ruling on Verizon's Motion for Confidential Treatment. *See* Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment, D.T.E 01-31 (August 29, 2001) ("Interlocutory Order") at 4, 8. The Department must afford AT&T the same treatment that is has afforded to Verizon.

likely create a competitive disadvantage that inhibits the full development of a competitive marketplace.

II. Placing Proprietary CLEC Information On The Public Record Could Have A Chilling Effect On The Willingness Of CLECs To Participate In Future Proceedings.

This proceeding arises from the Department's assertion of its authority over Verizon's retail prices. In the instant proceeding, AT&T is not the direct subject of the Department's regulatory authority. AT&T has nevertheless intervened because it has an interest in the development of competition in the retail services for which Verizon's prices are being regulated in this docket. AT&T submits that the Department's decision making benefits from the participation and perspective of competing carriers especially when a primary goal of the Department's regulatory policy is the development of a more competitive market place.

The laws and precedent balancing the protection of proprietary information with the disclosure of public information in Department proceedings developed initially in a very different environment. Department proceedings involved the review of monopoly providers. In these situations, the only adverse interest was the public interest. Therefore, it made sense for the Department to ensure that almost all filed documents were placed on the public record. This allowed for the widest possible dissemination of such materials, so that the public could respond, if a response were called for.

In the present case, AT&T is not a regulated monopoly utility whose prices will be determined in this proceeding. Therefore, the public's interest is not adverse to AT&T in the same sense as the public's interest was adverse to the monopoly in traditional regulatory proceedings. The principal party with an arguably adverse interest to AT&T is Verizon. Indeed, only Verizon has an incentive to test the information filed by AT&T and has already been given the opportunity to do so because AT&T has already provided the information to Verizon.

Therefore, there is no overarching public interest that would outweigh the need to protect information that is demonstrably sensitive and, if known to competitors, could be used to AT&T's competitive detriment.

Conclusion

For the reasons stated above, AT&T requests that the Department grant its Motion for Protective Treatment of the above discussed percentages in the Fea Testimony filed on August 24, 2001. This information is entitled to protective treatment and a contrary decision could chill the future beneficial participation of CLECs in proceedings such as the present one.

Respectfully submitted,

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